RE SUBRAMANIAM PALANI; EX P THARENPALAN SUBRAMANIAM

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[BANKRUPTCY CASE NO: 29-11377-12-2011]
24 JUNE 2015

BANKRUPTCY: *Receiving and adjudication orders – Power of court to annul – Grounds for annulment – Creditor's petition and bankruptcy notice – Whether creditor's petition filed out of time – Substituted service of bankruptcy cause papers – Whether defective – Whether judgment debtor reasonably notified of bankruptcy proceedings – Whether bankruptcy proceedings advertised in local newspaper – Whether bankruptcy notice wrong when it included pre-judgment interest that was already time barred – Whether merger principle automatically applied to all pre-judgment interest – Whether statutory threshold of RM30,000 to justify commencement of bankruptcy proceedings complied with – Bankruptcy Rules 1969, rr. 97, 109, 110 & 276 – Rules of Court 2012, O. 62 r. 5 – Civil Law Act 1956, s. 11*

The judgment debtor ('Subramaniam') was a partner in the partnership known as Subrita Enterprise that appointed the judgment creditor ('Tharenpalan') to carry out road surfacing works. By reason of Subrita Enterprise's failure to pay Tharenpalan for the works done, Tharenpalan brought a civil suit against Subramaniam. Final judgment was entered against Subramaniam on 25 June 2004 for RM17,500 with interest of 8% per annum from 27 May 1995 till full settlement and costs of RM3,864. Tharenpalan had on 5 December 2011 issued a bankruptcy notice against Subramaniam for the sum of RM42,498.24. Bankruptcy proceedings were fixed for mention before the Senior Assistant Registrar ('SAR') on 21 March 2012 and Tharenpalan attempted to serve the bankruptcy notice on Subramaniam at 34, Impian Jaya 5, Taman Saujana Impian, 43300 Kajang, Selangor ('Taman Saujana'). By reason of Tharenpalan's inability to serve the bankruptcy notice personally on Subramaniam, Tharenpalan obtained an order for substituted service on 3 May 2012. Subsequently, Tharenpalan filed a creditor's petition on 2 January 2013 and again attempted to serve the creditor's petition personally on Subramaniam at Taman Saujana. Again, by reason of Subramaniam's inability to serve the creditor's petition personally on Subramaniam, Tharenpalan obtained an order for substituted service on 10 January 2013. At the hearing of the creditor's petition on 26 February 2013, the SAR struck off the bankruptcy proceedings against Subramaniam by reason that the creditor's petition was filed out of time without leave given to Tharenpalan for an extension of time to file the creditor's petition. Tharenpalan appealed to judge-in-chambers and on 27 June 2013, the judge-in-chambers reversed the decision of the SAR. The creditor's petition was again heard before the SAR on 18 July 2013 and a receiving order and

A adjudication order ('ROAO') was accordingly pronounced against Subramaniam. Subramaniam, who was living at Taman Sri Ukay, came to know from a third party that a ROAO had been pronounced against him only on 2 January 2014. Consequently, Subramaniam filed an application under s. 105(1) of the Bankruptcy Act 1967 to annul the ROAO. This was an appeal
B by Subramaniam *vide* encl. 52 against the decision of the SAR in refusing Subramaniam's application to annul the ROAO made against him. During the appeal, Subramaniam principally contended that he ought not be adjudged a bankrupt for reasons, *inter alia*, that the bankruptcy process was irregular in that the creditors' petition was filed out of time without leave or
C prior obtaining an extension of time and that he had not been properly served and made aware of the bankruptcy proceedings. In this regard, Subramaniam contended that the court order for substituted service did not stipulate for a newspaper advertisement of the bankruptcy notice and creditor's petition. Further, Subramaniam also argued that Tharenpalan's computation of the amount due under the final judgment in the bankruptcy notice was wrong by
D reason that it included pre-judgment interest that was already time- barred by the Limitation Act 1953. If this interest was shaved off, the judgment debt fell below the statutory threshold of RM30,000 which was required to commence bankruptcy proceedings as provided in s. 5(1) of the BA and the court therefore did not have the jurisdiction to grant the ROAO. In addition,
E Subramaniam submitted that the date stated and used for the computation of the pre-judgment interest in the bankruptcy notice was wrong, *to wit*, two days earlier than that stated in the judgment. Subramaniam submitted that this was a fatal technical defect that could not be cured. On the other hand, Tharenpalan retorted that the pre-judgment interest was subject to the merger
F principle.

Held (allowing appeal with costs; setting aside order of senior assistant registrar):

(1) Even if the filing of the creditor's petition was out of time, no particulars
G in this regard were given in Subramaniam's supporting affidavit. In any event, even if this was so, it did not *ipso facto* invalidate the ROAO obtained if there was non-compliance with the Bankruptcy Act or Rules. Further, this point was already earlier dealt on appeal by Tharenpalan to the judge-in-chambers after the creditor's petition was struck off by
H the SAR. Therefore, the court was *functus officio* on this point. (para 24)

(2) Although rr. 97 and 109 of the Bankruptcy Rules 1969 ('Rules') prescribe personal service of the bankruptcy notice and creditor's petition, r. 110 of the same Rules also provide for substituted service if
I the court is satisfied that prompt personal service could not be effected and the bankruptcy notice and/or the creditor's petition is deemed to

have been duly served if the judgment creditor complied with the court order granting substituted service. The mode and manner of substituted service are not prescribed in the Bankruptcy Rules, thus by virtue of r. 276 of the Rules, O. 62 r. 5 of the Rules of Court 2012 ('ROC') would apply *mutatis mutandis*. (paras 26 & 27)

(3) Although Tharenpalan had complied with the substituted service order of the court, the hearing of the creditor's petition against Subramaniam was conducted *ex parte*. Thus, by the invocation and application of O. 32 r. 6 of the ROC *mutatis mutandis*, the ROAO may be set aside. This is because it is not a definitive order but only a provisional order that could be subjected to review based on evidence and arguments subsequently adduced by the opposing party. There was no prohibition or impediment against the review being undertaken pursuant to s. 105(1) of the BA application rather than a setting aside application that is normally done. (paras 32 & 33)

(4) The merger principle did not automatically apply to all pre-judgment interest. The principle is invoked only if the interest was contractually agreed by the parties with the merger provision built in the contract. It did not, however, apply if pre-judgment interest is awarded pursuant to s. 11 of the Civil Law Act 1956 as is the case herein. Thus, Tharenpalan had over computed the interest and the legally due sum as demanded against Subramaniam in the bankruptcy notice was excessive. The time barred pre-judgment interest must be discarded. It followed that the ROAO granted was necessarily void because the statutory threshold to justify the commencement of the bankruptcy proceedings was unmet at that instance. (paras 39 & 41)

(5) Since bankruptcy proceedings result in personal inconvenience as well as grave financial and reputational consequences, the court must require the judgment creditor to be vigilant and diligent in ensuring that due process had been strictly followed. The misstatement of the date herein was however fatal because it misrepresented the underlining originating basis of the bankruptcy proceedings. It was thus more than a formal defect. The availability of s. 131 of the Bankruptcy Act and r. 274 of the Rules respectively should be sparingly resorted to. (para 43)

Case(s) referred to:

Bank Bumiputra Malaysia Bhd & Ors v. Safuan Holdings Sdn Bhd & Ors; Allied Bank Malaysia Bhd (Intervener) [2010] 7 CLJ 621 HC ***(refd)***

Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 FC ***(refd)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(refd)***

Hasnah Che Hasan v. Hongkong Bank Malaysia Bhd [2010] 7 CLJ 190 HC ***(refd)***

Klienwort Benson Ltd v. Lincoln City Council [1998] 3 WLR 1095 ***(refd)***

A *Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC*
Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(dist)***
Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(dist)***
Pg Ahmad Pg Hj Abdullah, Re: ex p; Oriental Bank Bhd [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463 HC ***(refd)***
Porter v. Freudenberg [1915] 1 KB 857 CA ***(refd)***
B *Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab) [2002] 5 CLJ 113 HC* ***(refd)***
Re Khoo Kim Hock [1974] 1 LNS 134 HC ***(refd)***
Re Stephen Wong Leong Kiong; ex p HSBC Bank Malaysia Bhd [2005] 5 CLJ 504 HC ***(refd)***
C *S Nirmala Muthiah Selvarajah, Re: Ex p; The New Straits Times Press (M) Bhd [1987] 1 CLJ 413; [1987] CLJ (Rep) 799 HC* ***(refd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***
Taiping Villa Development Sdn Bhd v. Lai Wei Kuan & Anor [2009] 1 LNS 1345 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(dist)***
D *WEA Records Ltd v. Visions Channel 4 Ltd [1983] 1 WLR 721* ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1), 105(1), 131
Bankruptcy Rules 1969, rr. 97, 109, 110, 274, 275, 276
Civil Law Act 1956, s. 11
E Contracts Act 1950, s. 74
Limitation Act 1953, s. 6(3)
Rules of Court 2012, O. 32 r. 6, O. 46 r. 2, O. 62 r. 5

For the appellant/judgment debtor - S Sivashankar; M/s Faidz Leong & Chong
For the respondent/judgment creditor - Irza Zulaikha; M/s Mathews & Assocs

F *Reported by Sandra Gabriel*

JUDGMENT

Lim Chong Fong JC:

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Introduction

[1] This is the appeal of the judgment debtor ("JD") (encl. 52) against the decision of the learned Senior Assistant Registrar dated 26 March 2015 refusing the JD's application under s. 105(1) of the Bankruptcy Act 1967 to
H annul the receiving order and adjudication order made against him dated 18 July 2013 ("ROAO") with costs of RM1,500.

[2] This appeal is by way of a re-hearing and the affidavits filed in connection with the application are as follows:

I (i) JD's affidavit in support affirmed by Subramaniam a/l Palani on 4 December 2014; and

(ii) JC's affidavit in reply affirmed by Tharenpalan a/l Subramaniam on 15 January 2015.

[3] After reading the written submissions of the parties, I heard counsel on 16 and 24 June 2015.

Salient Facts

[4] The JD was a partner in the partnership known as Subrita Enterprise that appointed the JC to carry out road surfacing works.

[5] By reason of Subrita Enterprise's failure to pay the JC for the work done, the JC brought a civil suit against the JD in the Port Dickson Magistrate Court *vide* Summons No 72-33-1995 ('suit').

[6] After trial, final judgment was entered against the JD on 25 June 2004 for RM17,500 with interest of 8% per annum from 27 May 1995 till full settlement and costs of RM3,864.

[7] The JC on 5 December 2011 issued a bankruptcy notice against the JD for the sum of RM42,498.24 particularised as follows:

Amount awarded in the judgment dated 25 June 2004	RM17,500.00
Add: Interest on RM 17,500.00 at the rate of 8% per annum from 25 May 1995 to 24 June 2010 and continuing	
	RM21,134.24
Add: Cost	RM 3,864.00

[8] The bankruptcy proceedings were fixed for mention before the Senior Assistant Registrar on 21 March 2012 and the JC attempted to serve the bankruptcy notice on the JD at 34, Impian Jaya 5, Taman Saujana Impian, 43300 Kajang, Selangor.

[9] By reason of the JC's inability to serve the bankruptcy notice personally on the JD, the JC obtained an order for substituted service on 3 May 2012.

[10] Subsequently the JC filed the creditor's petition on 2 January 2013 and again attempted to serve the creditor's petition personally on the JD at 34, Impian Jaya 5, Taman Saujana Impian, 43300 Kajang, Selangor.

[11] Again by reason of the JC's inability to serve the creditor's petition personally on the JD, the JC obtained an order for substituted service on 10 January 2013.

[12] At the hearing of the creditor's petition on 26 February 2013, the Senior Assistant Registrar struck off the bankruptcy proceedings against the JD by reason that the creditor's petition was filed out of time without leave given to the JC for an extension of time to file the creditor's petition.

[13] The JC appealed to judge in chambers and on 27 June 2013, Mohamad Zabidin Diah J reversed the decision of the Senior Assistant Registrar.

[14] The creditor's petition was again heard before the Senior Assistant Registrar on 18 July 2013 and ROAO was accordingly pronounced against the JD.

[15] The JD who was living at 46 Jalan 4 Taman Sri Ukay, 68000 Ampang Selangor only on 2 January 2014 came to know from a third party that ROAO has been pronounced against him.

[16] Consequently the JD on 5 December 2014 file the application under s. 105(1) of the Bankruptcy Act 1967 to annul the receiving order and adjudication order.

Contentions Of The Parties

[17] The JD principally contended that the court should exercise its discretion to annul the ROAO because the JD ought not to be adjudged a bankrupt for three reasons, *to wit*:

(i) the bankruptcy process against the JD is irregular in that the creditor's petition was filed by the JC out of time and the JD has not been properly served and made aware of the bankruptcy proceedings at all material times;

(ii) the amount stated in the bankruptcy notice is excessive and therefore erroneous because the calculation of the interest is in contravention of s. 6(3) of the Limitation Act 1953; and

(iii) the bankruptcy notice is void because the computation of the amount of the interest therein commenced on 25 May 1995, two days earlier than 27 May 1995 that is stipulated in the final judgment.

[18] Basically the JC denied the JD's contentions and maintained that the ROAO has been properly and lawfully obtained by the JC.

Findings Of The Court

[19] The JD's application is made under s. 105(1) of the Bankruptcy Act 1967 which reads:

> 105. Power of the court to annul adjudication in certain cases
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> (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

Notwithstanding that the JD has been adjudged a bankrupt, it is trite law that the JD may proceed with this application without the sanction of the General Director of Insolvency; see *Re Khoo Kim Hock* [1974] 1 LNS 134; [1974]

2 MLJ 29 and also in *Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab)* [2002] 5 CLJ 113 where Ramly Ali JC (now FCJ) said as follows at 117:

> An undischarged bankrupt may make an application under s. 105 of the Act without the sanction of the official assignee as s. 38(1)(a) of the Act had no application to an application under s. 105 of the Act The JD has *locus standi* to file an application under s. 105 of the Act as per enc. 21.

[20] Zaki Azmi CJ in the Federal Court case of *Sardar Mohd Roshan khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661; [2010] 4 MLJ 285 held and concluded at p. 674 (CLJ); p. 297 (MLJ) as follows with regard to s. 105 of the Bankruptcy Act:

> [35] **Granting an order for annulment is discretionary in nature. The court will have to consider all the facts and circumstances before deciding whether to grant an order annulling the adjudication order**. The court should also note all implications that might occur before exercising such discretion and make such order. The court has to be satisfied of the facts disclosed in the affidavit supporting the erstwhile bankrupt's application to annul his bankruptcy (see *Williams and Muir Hunter on Bankruptcy* and *Halsbury's Laws of England* (4th Ed) Vol 3 para 458).
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> **[36]** After having carefully and fully considered all that I have mentioned earlier, I have come to this decision. Section 105 is to be strictly construed, not only based on the wording of that section but also how the section came into being. It is not for me to say why the legislators deem it fit to enact such a provision. It is for me only to interpret it. (Emphasis added.)

Furthermore Abdul Hamid Mohamad FCJ (as he then was) had this to say at 819 in *Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809:

> From the cases referred to above, it appears that only Terrel J in *Re: Yap E Boon (supra)* talked about "There must have been some defect" which seems to suggest technical defects. But, it must be remembered that the ground for the application for annulment in that case, ie, that the debt was not in existence on the date the act of bankruptcy was alleged to have been committed, was itself a "technical defect" if proved to be true.
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> On the other hand, even if we put aside the general observations of Cave J and Charles J in *In re Hester: ex-parte Hester (supra)* and look at the examples given by them and also in *Re: Yap E Boon (supra)* and by the learned authors of *Halsbury's Laws of England (supra)*, *it appears that the scope of discretion under s. 105(1) is not only limited to technical defects, eg, defective service of the bankruptcy notice and/or the creditor's petition or that there was no debt due or that no act of bankruptcy was committed. Opinion is unanimous that abuse of process of the court is a ground for annulling the R.O. & A.O under the first limb of s. 105(1). I think, abuse of process of the court may or may not be a "technical defect". So, I am of the view that that the provision should not be read to cover only technical defects, but it is wider and includes other "legal grounds" like abuse of the*

A *process of the court (this is only an example). However, I do not think that it should be stretched too far to cover extraneous " moral "or" equitable "grounds. It has to be a legal ground as the court is only concerned with the law*." (emphasis added.)

[21] Hence it involves the exercise of discretion which must naturally be made judiciously based on the circumstances of the case and the settled rules B and principles.

Irregularity In The Bankruptcy Process

[22] Bankruptcy proceedings are governed by the provisions in the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 made thereunder. In C the absence of any rule regulating the process, the Rules of Court 2012 shall apply *mutatis mutandis*; see r. 276 of the Bankruptcy Rules.

[23] The first irregularity raised by the JD is that the creditor's petition was filed out of time without leave or prior obtaining an extension of time from the court. In this regard, rr. 275 and 274 of the Bankruptcy Rules stipulate D as follows respectively:

275. Abridgement or extension of time

The Court may under special circumstances and for good cause shown extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceedings.

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274. Effect of non-compliance with Rules

Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner F and upon such terms as the Court may think fit.

In addition, it is provided in s. 131 of the Bankruptcy Act as follows:

131. Formal defect not to invalidate proceedings

G No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[24] Though argued by counsel for the JD in his written submission, I am H unable to see from the cause papers as to how the filing of the creditor's petition was allegedly out of time as no particulars whatsoever in this regard were given in the JD's supporting affidavit. In any event, even if this was so, this does not *ipso facto* invalidate the ROAO obtained if there was non compliance with the Bankruptcy Act or Rules. I also observed that this point I was already earlier dealt on appeal by the JC to judge in chambers after the creditor's petition was struck off by the Senior Assistant Registrar. The court is thus *functus officio* on this point.

[25] The more potent argument of counsel for the JD is that the bankruptcy process was conducted and concluded *ex parte* without the actual knowledge of the JD. According to the JD, he was at all material times unaware of the existence of the bankruptcy proceedings because he was not personally served with the bankruptcy cause papers and was no longer residing at the address last known to the JC.

[26] Although rr. 97 and 109 of the Bankruptcy Rules prescribe personal service of the bankruptcy notice and creditor's petition, r. 110 of the same Rules also provide for substituted service if the court is satisfied that prompt personal service could not be effected and the bankruptcy notice and/or the creditor's petition is deemed to have been duly served if the JC complied with the court order granting substituted service.

[27] The mode and manner of substituted service are not prescribed in the Bankruptcy Rules, thus by virtue of r. 276, O. 62 r. 5 of the Rules of Court 2012 would apply *mutatis mutandis*.

[28] In this regard, counsel for the JD contended that the court order for substituted service did not stipulate that for newspaper advertisement of the bankruptcy notice and creditor's petition. Consequently, the JD could not reasonably be deemed to have knowledge of the bankruptcy process and that explained his failure to challenge the bankruptcy notice and/or creditor's petition as well as non-attendance at the hearing of the creditor's petition.

[29] As commented in the Malaysian Civil Procedure 2012 at para. 62/5/3 on the methods of service, *Porter v. Freudenberg* [1915] 1 KB 857, CA state that the method of substituted service asked for by the plaintiff which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ to the defendant. This can be effected by posting the documents at the last known address of residence or business, and at the notice boards of the court in which action is brought, and by advertisement in the local newspapers, and in a language which would reasonably ensure that the person to be served will acquire knowledge of the proceeding against him. The method of service has to meet the objective of O. 62 r. 5(3) in bringing the notice to the notice of the defendant; see *S Nirmala Muthiah Selvarajah, Re: Ex p; The New Straits Times Press (M) Bhd* [1987] 1 CLJ 413; [1987] CLJ (Rep) 799; [1988] 2 MLJ 616, HC and *Taiping Villa Development Sdn Bhd v. Lai Wei Kuan & Anor* [2009] 1 LNS 1345; [2009] MLJU 1506.

[30] It seems plain to me that if the service is made indirectly by way of substituted service, the critical objective that must be achieved is to ensure that the defendant/judgment debtor has reasonably been made aware of the service of the legal proceedings. Otherwise, justice is not done *albeit* seen to have been done.

[31] In *Hasnah Che Hasan v. Hongkong Bank Malaysia Bhd* [2010] 7 CLJ 190; [2010] 4 MLJ 241, VT Singham J said as follows at pp. 218-219 (CLJ); p. 268 (MLJ):

> [41] In the circumstances, this court is of the considered view when taking into account the cumulative effect of the defects and in particular, the non-service of the creditor' petition in accordance with the order of court, it is not fair and equitable that the debtor should have seen adjudged a bankrupt. This court is satisfied that the JD has advanced sufficient reasons in support of the application (encl. 21) to annul the adjudicating order made on 21 November 1995 and to rescind the receiving order of the same date under the first limb of s. 105(1) of the Act respectively (see *Re Amos William Dawe; Amos William Dawe v Wayfoong Mortgage and Finance (Singapore) Ltd* [1980] 1 MLJ 200; *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292; *Kwong Yik Bank Bhd v. Hah Chiew Yin Yin* [1985] 2 MLJ 452; *Dato' Haji Mohd Muslim bin Othman v. Shuaib bin Lazim & Anor* [1993] 1 AMR 319; *Re A Debtor (No 446 of 1918)* [1920] 1 KB 461 at p 465; *Re A Debtor (No 12 of 1970) ex p Official Receiver v. The Debtor* [1971] 1 All ER 504; *Re Davidson* [1894] WN 210; *Re Carr* (1886) 35 WR 150; *Re A Debtor (No 994 of 1935); The Debtor v Official Receiver* [1936] 1 All ER 794; *Re Shuaib bin Lazim, ex p Merchantile Insurance Sdn Bhd* [1992] 4 CLJ 2066).
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> [42] The cumulative merits of the various arguments and grounds raised by learned counsel for the JD is not without any basis as to the flaws and defects as found by this court which requires serious consideration in view of the fact that bankruptcy laws are to be strictly interpreted and complied. As far as this court is concerned, the paramount consideration in the instant case is to ensure that justice is done and parties comply strictly with the procedural requirements of the bankruptcy laws, ie, the Bankruptcy Act 1967, the Bankruptcy Rules 1969 and the binding authority of precedent (see *Re Stephen Wong Leong Keong ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504; *Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809). This court finds that substantial injustice has been caused by the several defects and flaws which are serious and the injustice cannot be remedied by invoking s. 131 of the Act or r. 274 of the Rules.
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> [43] *There has been procedures impropriety and unfairness to the JD. It is the function of this court in this rehearing to put the records right and in accordance with the demands of justice. This is the essence of judicial duty. A litigant who has lost his or her case will not believe he or she has been fairly treated if his or her adversary is able to obtain an order or judgment against him or her by default without having served the cause papers as required by law and in this case, in accordance with the order of court made on 19 July 1995. Justice must not only be done but must manifestly be seen to be done.* Therefore, this observation necessarily must mean the court must exercise its discretion judicially and not in reference to any mechanical formula otherwise it will defeat the whole purpose of a litigant seeking a judicial decision in cases filed in court (see *Re Yong Tet On Paul, ex p Chung Khiaw Bank Ltd* [1996] 1 CLJ 836; [1996] 1 MLJ

721; *Re Peter Wong; ex parte The Debtor* [1958] 1 LNS 66; [1959] MLJ 27). Had the learned deputy registrar taken into consideration that the creditor's petition was not served as per the affidavit of posting, there is a possibility that on the set of facts, she may not have granted the receiving and adjudicating order. This court cannot permit such travesty of justice to stand unrectified when it is brought to the attention of this court.

[44] In the circumstances and in accordance with the rules of reason and justice, this court finds that this is a suitable case for this court to interfere with the order made by the learned deputy registrar on 21 November 1995 where the application of the JD was dismissed. (emphasis added.)

[32] Unlike in *Hasnah Che Hasan v. Hongkong Bank Malaysia Bhd (supra)* where the service of the creditor's petition did not comply with the court order, the JC has however in the case herein complied with the substituted service order of the court. I am however not convinced that the JD has been reasonably notified of the bankruptcy proceedings brought against him by the JC by reason that there was no advertisement in the local newspapers because that was not prescribed in the order. That notwithstanding, I am mindful that the Supreme Court in *Development Commercial Bank Bhd v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141; [1995] 3 MLJ 472 held that the validity of the substituted service order can only be challenged by proceedings instituted for that very purpose but cannot be challenged collaterally in other proceedings. The JD is in this case precisely making a collateral challenge through its application under s. 105 of the Bankruptcy Act. Although I share the above views and sentiments of VT Singham J, I am however bound by *stare decisis* and hence unable to consider this ground *per se* as well.

[33] Be that as it may, it is plain as the result thereof, the hearing of the creditor's petition against the JD was conducted *ex parte*. Thus by the invocation and application of O. 32 r. 6 of the Rules of Court 2012 *mutatis mutandis*, the ROAO may be set aside. This is because it is not a definitive order but only a provisional order that can be subject to review based on evidence and arguments subsequently adduced by the opposing party; see *WEA Records Ltd v. Visions Channel 4 Ltd* [1983] 1 WLR 721. There is also in my view no prohibition or impediment against the review being undertaken pursuant to a s. 105(1) application rather than a setting aside application that is normally done. Upon this premise, I next critically examine into the other two reasons raised by counsel of the JD on their merits.

Amount In Bankruptcy Notice Excessive In Contravention Of The Limitation Act

[34] The contention by counsel of the JD here is that the JC's computation of the amount due under the final judgment in the bankruptcy notice was wrong by reason that it included pre judgment interest that was already time

barred by the Limitation Act 1953. If this interest is shaved off, the judgment debt fell below the statutory threshold of RM30,000 required of the JC to commence bankruptcy proceedings as provided in s. 5(1) of the Bankruptcy Act as follows:

> 5. Conditions of which creditor may petition
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> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
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> (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit, and
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> (b) the debt is a liquidated sum payable either immediately or at some certain future time; and
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> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and
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> (d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

[35] According to the JD, the JC cannot claim interest for the entire period of 15 years and 35 days in the sum of RM 21,134.24 from 25 May 1995 till 24 June 2010 as stated in the bankruptcy notice. In this respect the interest comprised of two portions, *to wit*:

(i) pre-judgment interest of RM12,734.24 for nine years and 35 days from 25 May 1995 till 26 June 2004; and

(ii) post-judgment interest of RM8,400 for six years from 26 June 2004 till 24 June 2010.

[36] It is provided in s. 6(3) of the Limitation Act 1953 as follows:

> 6. Limitation of actions of contract, tort and certain other actions
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> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[37] Accordingly counsel for the JD contended that the interest amounting to RM14,759.42 for ten years six months and 11 days from 25 May 1995 till 5 December 2005 as at the date of filing of the bankruptcy notice on

5 December 2011 has been time-barred; see *Bank Bumiputra Malaysia Bhd & Ors v. Safuan Holdings Sdn Bhd & Ors; Allied Bank Malaysia Bhd (Intervener)* [2010] 7 CLJ 621; [2010] 7 MLJ 185. Hence the sum that was legally due at that date is only RM27,738.82 and not RM42,498.24. The legally due sum is well below the statutory threshold and the court therefore did not have the jurisdiction to grant the ROAO.

[38] However, counsel for the JC retorted that the pre-judgment interest is subject to the merger principle following the Federal Court cases of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413; [2002] 2 MLJ 385, *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241 and *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787.

In this regard, Abdul Malek Ahmad FCJ (as he then was) in *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin (supra)* said as follows at p. 427:

> Thus, a person filing an action for recovery of arrears of interest on the last day of the six-year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, arrears of interest included.
>
> In the instant case, although the amount of arrears of interest claimed is only for six years from the judgment date, the bankruptcy notice had been filed on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. Accordingly, the bankruptcy notice is rendered invalid. *As for the prejudgment interest, despite the Court of Appeal's finding on this point, we hold that that is in order as it is merged with the principal amount from the date of the breach, and which is the standard stipulation in all contracts, to become the judgment debt*. (emphasis added.)

Therefore the contention of the JD is misconceived as contended by the JC.

[39] In reply, counsel for the JD pointed out that the merger principle does not automatically apply to all pre-judgment interest. The principle is invoked if and only if the interest was contractually agreed by the parties with the merger provision built in the contract as seen from the aforequoted *dicta* of Abdul Malek Ahmad FCJ. It does not however apply if pre-judgment interest is awarded pursuant to s. 11 of the Civil Law Act 1956 as is the case herein. Section 11 of the Civil Law Act reads as follows:

> 11. Power of courts to award interest on debts and damages
>
> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;

A (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

B This is the alternative basis for the award of pre-judgment interest aside from that contractually provided for by the parties or claimed as special damages; see s. 74 illustration (n) of the Contracts Act 1950 in respect of the latter. It is discretionary in nature.

[40] The parties were not able to find any case authority in point. I tend C to agree with the submission of counsel for the JD. From the Federal Court cases cited by counsel for the JC, they are clearly banking cases on loan recovery based on copious loan agreement that contained the standard stipulation of merger of interest into the judgment debt. It is not the case here and the Federal Court cases cited are thus distinguishable. There is no evidence that the road surfacing contract between the JC and JD contained D such an equivalent provision and there is nothing in s. 11 of the Civil Law Act that imports this merger principle. Moreover this principle seems to me to be neither a right conferred by statute nor at common law.

[41] Consequently as contended by counsel for the JD, I find and hold that E the JC has over computed the interest and the legally due sum as demanded against the JC in the bankruptcy notice is hence excessive. The time barred pre-judgment interest must be discarded. It follows that the ROAO granted is necessarily void because in the result the statutory threshold to justify the commencement of the bankruptcy proceedings was unmet at that instance.

F **Bankruptcy Notice Is Void Because Earlier Computation Of Interest Than That Stipulated In The Final Judgment**

[42] The JD's contention here is that the date stated and used for the computation of the pre-judgment interest in the bankruptcy notice is wrong, *to wit*, two days earlier than that stated in the judgment. It was submitted by G counsel that this is a fatal technical defect by reason that the JC relied on something that is extraneous and cannot be cured. In *Pg Ahmad Pg Hj Abdullah, Re: ex p; Oriental Bank Bhd* [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463, Syed Ahmad Idid JC (as he then was) said as follows at pp. 466-467:

H I find that the defect in the incorrect amount claimed, though the amount was of a lesser sum than due and despite learned Counsel's undertaking to forgo the balance, was not a formal one. It misled the applicant. The bankruptcy notice must be in prescribed form and not deviate as had occurred here.

I come to this conclusion because of the serious consequences following I a bankruptcy notice - it can lead to penal or quasi-penal consequences. So all who contemplate taking someone to Court to have him/her declared

as a bankrupt must have sound grounds to do so, must comply with the strict letter of the law and use the correct format as prescribed in the bankruptcy rules.

To conclude, I shall quote from *Hamidah bte Abdul Hamid & Anor v. Polynesia Offshore Supplies (B) Bhd* [1990] 1 LNS 45 [1990] 3 MLJ 94, where the Court of Appeal in Brunei held that:

> ... it is clear that bankruptcy proceedings are of a quasi-penal nature and it is imperative that the procedural requirements are strictly complied with. (emphasis added.); see also *Re Fadzil bin Othman, ex p Malayan Banking Bhd* [1993] 1 LNS 105; [1994] 2 MLJ 474.

[43] I agree with and adopt the views of Syed Ahmad Idid JC (as he then was). Since bankruptcy proceedings result in personal inconvenience as well as grave financial and reputational consequences on the judgment debtor, the court must require the judgment creditor to be vigilant and diligent in ensuring that the due process has been strictly followed. I am nonetheless mindful of the availability of s. 131 and r. 274 of the Bankruptcy Act and Rules respectively but they should in my view be sparingly resorted to as seen for example in *Re Stephen Wong Leong Kiong; ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504 on an instance of curable misstatement of date. It is my view that the misstatement of the date herein is however fatal because it misrepresented the underlining originating basis of the bankruptcy proceedings. It is thus more than a formal defect.

In *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263, Mohamed Azmi SCJ said as follows at p. 177 (CLJ); p. 266 (MLJ):

> *Thus In re HB [1904] 1 KB 94, a bankruptcy notice was held to be bad if founded not according to its terms but on some agreement which modified the terms of the judgment, and therefore not in accordance with the terms of the judgment. Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice*. The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the terms of the judgment, and applying the rule of strict construction, the notice cannot be deemed to fall within section 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a bankruptcy petition founded on it must necessarily fail ... (emphasis added)

A **Bankruptcy Proceedings Commenced Without Leave Of Court**

[44] At the hearing, I drew the attention of both counsel to the very recent Federal Court case of *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561 that held as follows at 591 to 594:

B [56] **Given the weight of the authorities, it must be that under s. 3(1)(i) of the BA 1967, the creditor must be in a position to issue immediate execution**. *Re A Kurumpian* [1918] 14 SSLR 144 which held to the contrary, simply could not stand.

C [57] In our considered opinion, *Woodall* is the first and the foremost authority to follow on the meaning of the words "execution thereon not having been stayed", the meaning of which should be construed in the context of s. 3(1)(i) of the BA 1967, and not from the perspective of s. 6(3) of the LA 1953. Section 6(3) of the LA 1953 should not be read to nullify O. 46 r. 2 of the RHC. Section 6(3) of the LA 1953 provides that "an action upon any judgment shall not be brought after the expiration D of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due". O. 46 r. 2(1)(a) of the RHC is not incompatible with s. 6(3) of the LA 1953. What it all comes to is this: (1) "an action upon a judgment shall not be brought after the expiration of twelve years from E the date that the judgment becomes enforceable", (2) "no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due", and, (3) "a writ of execution to enforce a judgment or order may not issue without the leave of court ... where six years or more have lapsed since the date of the judgment or order" ...

F [61] B*y reason of the aforesaid, our answer to the first leave question is in the positive, that is to say that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed from the date of the judgment, must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC, now replaced by O. 46 r. 2 of the Rules of Court 2012 ...* (emphasis added)

G **[45]** Counsel for the JC graciously conceded that the bankruptcy proceeding against the JD herein was commenced after more than six years having lapsed from the date of the final judgment without prior leave obtained from the court pursuant to O. 46 r. 2 of the Rules of Court 2012. She however argued that the case of *Dr Shamsul Bahar Abdul Kadir & Another* H *Appeal v. RHB Bank Bhd (supra)* should not be given retrospective effect. At the time of the JC's commencement of the bankruptcy proceedings, it was then unnecessary for the JC to have obtained prior leave following the federal court decision of *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253. No case authority was cited to support the proposition I that the latest case has no retrospective effect.

[46] It is my view that the contention of the JC is not in consonance with the declaratory theory of common law, that is to say judges do not create or change the law but they declare what the law has always been. In this regard, Lord Goff of Chieveley said as follows in the House of Lords case of *Kleinwort Benson Ltd v. Lincoln City Council* [1998] 3 WLR 1095:

> Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law ... It is into this category that the present case falls; but it must nevertheless be seen as a development of the law, and treated as such ... When the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is to be applied to all and yet capable of organic change.

[47] I thus reject the JC's contention. In the result, the bankruptcy proceeding commenced by the JC was void.

Conclusion

[48] For the foregoing reasons as positively found for the JD individually as well as cumulatively, I am satisfied that this is a fit and proper case for me to exercise my discretion in favour of the JD because it is just and reasonable to do so in the circumstances.

[49] Accordingly I allow the JD's appeal with costs of RM5,000. The order of the learned Senior Assistant Registrar dated 26 March 2015 is set aside.